

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Tariff Filing Requirements for
Nondominant Common Carriers

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CC Docket No. 93-36

To: The Commission

Comments of the Telecommunications Resellers Association

I. Introduction

1. The Telecommunications Resellers Association (TRA), representing over 130 non-facilities based Interexchange Carriers (switchless resellers) and their suppliers, hereby comments on the Commission's Notice of Proposed Rulemaking (NPRM) in the matter of tariff filing requirements for nondominant common carriers on behalf of its members.

2. TRA welcomes the opportunity to participate in this rulemaking proceeding that will ultimately and profoundly impact the competitiveness of all of its members — all of whom are nondominant carriers. The annual revenue for the majority of member companies falls far short of the Commission's \$100 million annual revenue threshold requiring revenue disclosure.

3. TRA heartily supports the Commission's policy objectives which were achieved in large part in its "forbearance policy" but recently invalidated by the United States Court of Appeals for the District of Columbia Circuit¹.

4. TRA believes that the Commission's proposed rule changes offered in CC Docket No. 93-36, with slight modification, will accomplish its objective to streamline, to the maximum extent possible consistent and with its statutory obligations, the tariff filing rules for domestic

¹ AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992), rehearing en banc denied, January 21, 1993 ("Forbearance Decision").

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nondominant common carriers.

II. Background

5. The Commission's tentative conclusions that "existing tariff regulation of nondominant carriers inhibits price competition, service innovation, entry into the market, and the ability of firms to respond quickly to market trends," and that "some of [The Commission's] existing streamlined tariff filing requirements are unnecessary for, and burdensome on, nondominant carriers" are shared by the TRA and the small carriers that comprise its membership.²

6. Carrier members of TRA (often called "switchless resellers") typically buy discounted long distance service from facilities-based carriers under volume and term commitments. While the relationship between the reseller as customer and the facilities-based carrier as supplier is often mutually cooperative, there are instances where this is not the case.

7. For example, several TRA members have engaged AT&T in litigation alleging that the carrier has engaged in discriminatory practices in a deliberate effort to discourage the resale of AT&T's Software Defined Network service offered under FCC Tariff No. 1.³ Many of these carriers are concerned with their competitive position vis a vis a facilities-based carrier from whom they purchase service (pursuant to the Commission's long-standing resale policy) if they are required to publish specific rate information on 14 day's notice.

8. Many TRA members entered the long distance services market partly on the basis that the FCC has a standing policy requiring the unlimited resale and shared use of all interstate

² NPRM In the Matter of Tariff Filing Requirements for Nondominant Common Carriers. CC Docket No. 93-36 at 12.

³ An example of such may be found in Case No. 92 Civ. 1735 in the United States District Court Southern District of New York, National Communications Association, Inc. - Plaintiff against American Telephone and Telegraph - Defendant

common carrier domestic public switched and private line long distance services.⁴

9. The thought of making specific price and service offering terms public for the examination and perusal of a supplier/competitor strikes fear in the hearts of the entrepreneurs that deliver these resold services to the domestic long distance market.

10. These service providers have a keen respect for the ability of a dominant carrier, one of the carriers from whom they purchase service, to allocate resources to monitor for anti-competitive purposes the published prices, terms and conditions under which they sell long distance services.

11. An acute example of the fear of apparent anticompetitive behavior is illustrated in a recent case filed by American Telephone and Telegraph Company (Plaintiff) against NOS Communications, Inc. and NOS, Inc., (Defendants) in which the defendant was granted relief in the form of a Temporary Restraining Order that mandated, *"The plaintiff, American Telephone & Telegraph Company, shall not represent, directly or through any agents or representatives, to any person or entity, including present and past customers of the defendants, that defendants are no longer in business, going out of business, and shall not make any false or misleading statements about defendant."*⁵

12. In this instance the defendant, a switchless reseller, suffered the experience of having his facilities-based long distance provider, AT&T, contact the reseller's customer base through direct mail and telemarketing efforts erroneously reporting that the reseller was out of business.

⁴ FCC 76-641 released July 16, 1976, 60 FCC 2d 261

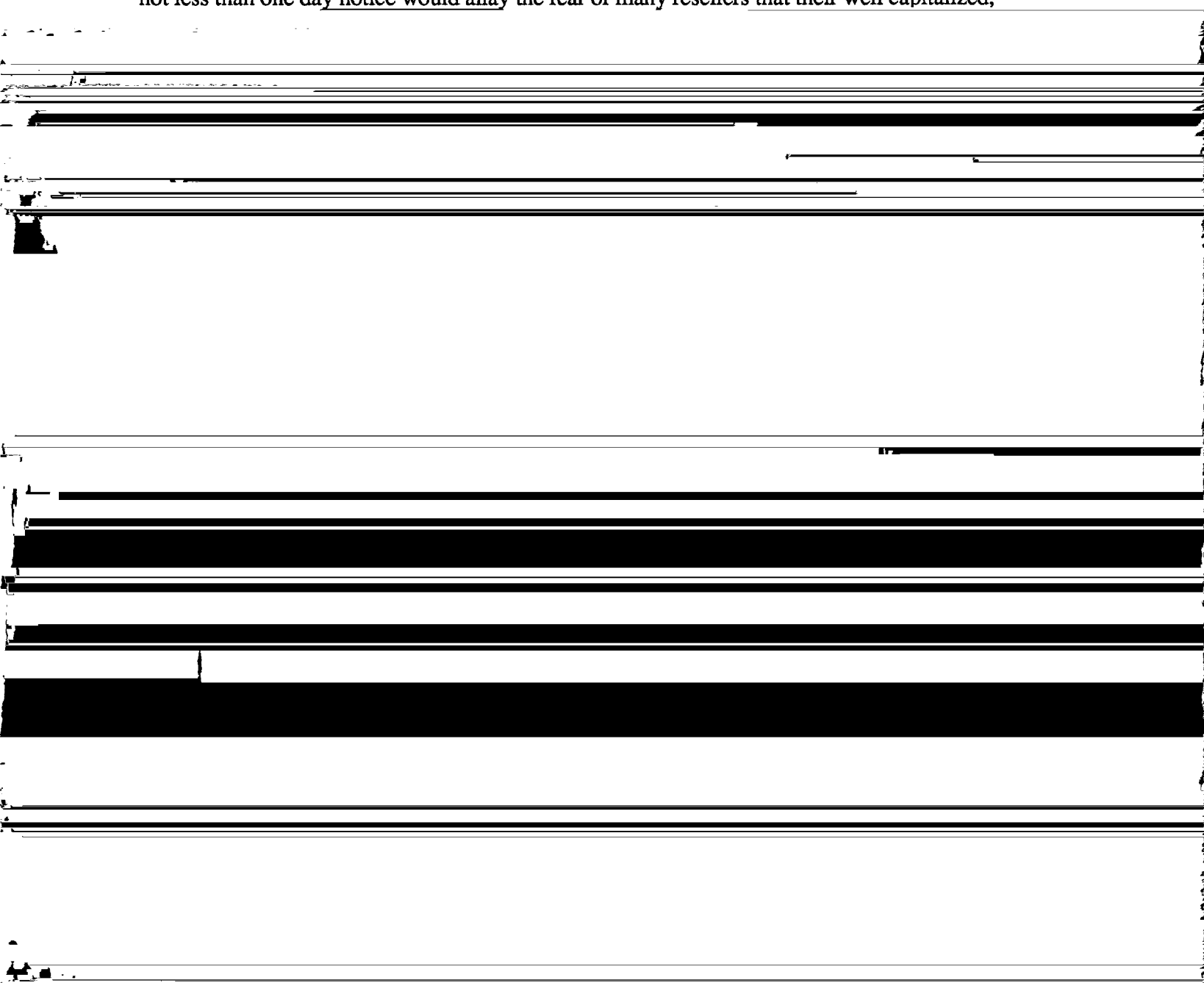
⁵ Civil Action No. 92-4172 (MTB) United States District Court For the District of New Jersey; Temporary Restraining Order issued 10/9/92.

13. This is the sort of corporate behavior that resellers fear would put them in an extremely uncompetitive position vis a vis a supplier/competitor if the reseller were required to file specific rates and terms for each unique customer service arrangement offered by the reseller.

III. Discussion on Proposed Rule Changes

A. Tariff Notice Requirements

14. The proposal to allow nondominant common carriers to file their interstate tariffs on not less than one day notice would allay the fear of many resellers that their well capitalized,



standing "forbearance" policy which permitted carriers lacking market power to refrain from filing tariffs, this proposal is an absolute requirement to meet the Commission's dual obligations to its statutory obligation of tariff regulation of nondominant carriers and its time-honored tradition of fostering a competitive marketplace.

19. The requirement for nondominant carriers to publish a maximum rate for long distance services under tariff will promote an environment among those carriers where instant flexibility for rates, terms and conditions for long distance services will be offered to the end-user market.

20. Because none of these carriers (particularly those with annual revenues less than \$100 million such as most TRA members) exercises market power, there is no danger to the supplier market of any of these carriers exercising predatory or below-cost pricing.

21. Such carriers, on the other hand, would be hard pressed to develop and allocate the resources necessary to continually update their tariff prices in an intensely competitive environment if required to file rate specific tariffs.

22. Many resale carriers are able to offer high quality, price competitive long distance service precisely because they have low overhead costs. It is not unusual for such carriers to have less than ten full-time employees.

23. The proposed requirement to file a maximum rate as part of an interstate tariff would not cause a major disruption in such an operation. To require such companies to continually update these tariffs with specific rate information could conceivably raise overheads costs to these companies by as much as ten percent.

24. Additionally, the administrative costs to the Commission to process iterative tariff information from these carriers would result in high costs to the Commission, and thus the American tax payer with no corresponding benefits to either the long distance consumer or supplier markets.

C. Tariff Form Requirements

25. In the entire preliminary proposal offered by the Commission to streamline tariffing requirements for nondominant carriers the proposal to require the filing of tariffs and tariff revisions on three and one half inch floppy diskettes in IBM-compatible form using MS DOS 5.0 and Word Perfect 5.1 software is the only one to which TRA **strenuously objects!**

26. The simple fact of the matter is that not all carriers currently have the hardware and software on hand to meet this requirement and the Commission's well-intentioned motive to create tariff filing efficiencies can be obtained in another manner.

27. Carriers that utilize Macintosh hardware and compatible software and carriers that utilize word processing other than Word Perfect, for example, could provide the Commission with floppy diskettes in an ASCII format that would be easily decoded by practically any hardware and software configuration.

28. Additionally, the Commission should consider allowing carriers the option of filing paper tariffs or tariffs on diskette and establishing tariff filing fees to reflect the costs to the Commission of handling the filings in various media.

29. TRA encourages the Commission to consider charging an amount less than the \$490 filing fee to accept tariff filings on diskette **while maintaining the current option available**

to carriers to file on 8 1/2" x 11" paper in black ink.

IV. Dominant / Nondominant Classification Remains Relevant

30. As mentioned, TRA strongly supports the Commission's intention to implement streamlined tariff filing requirements for non-dominant carriers. The Commission's acknowledgment of the significant differences between dominant and nondominant carriers and their impact on the market is essential toward maintaining the highly competitive interexchange telecommunications environment the Commission has strived to maintain.

31. Such acknowledgment of the significant differences between dominant and nondominant carriers from the perspective of regulation and tariffing requirements in particular, is certainly not without precedence.

32. The State of California, arguably the largest intrastate interexchange marketplace in the United States, has adopted a bifurcated regulatory approach, treating AT&T as the dominant carrier and others as "Nondominant Interexchange Carriers" ("NDIEC"). Although the California Public Utilities Commission ("CPUC") recently granted AT&T Communications of California, Inc., ("AT&T-C") increased regulatory flexibility for a limited number of services, it retained its bifurcated regulatory regime.⁷

33. AT&T-C's California application for regulatory flexibility did not seek deregulation or reclassification as a NDIEC, nor did it seek regulatory parity with other interexchange carriers. Moreover, AT&T acknowledged the differences in California's regulatory requirements in its

⁷ See e.g. California Public Utilities Commission Decision 93-02-010 in Application 90-07-015, In the Matter of the Application of AT&T Communications of California, Inc. for Additional Regulatory Flexibility, et al., February 3, 1993.

application, as paraphrased by the CPUC in its Order: "AT&T points out that significant regulatory differences will continue to exist between [AT&T] and its competitors if the [California Public Utilities] Commission adopts AT&T-C's proposal.⁸

34. The CPUC underscored its view of AT&T's dominant market position by concluding in its final Order, "If [AT&T-C's] M[essage] T[elephone] S[ervice] rates rise over time, and AT&T-C's market share remains steady or increases, we may be convinced that more stringent regulatory controls need to be imposed on AT&T-C's MTS services."⁹

35. Clearly, the applicability of more streamlined tariff filing rules are warranted, as exemplified by California's experience.

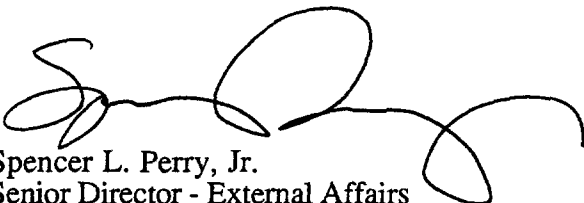
V. Conclusion

36. In the interest of preserving a robust competitive long distance market, TRA supports the Commission's proposals to allow nondominant common carriers to file their interstate tariffs on not less than one day notice; reduce tariff content requirements for nondominant carriers by allowing maximum rates or a range of rates; and a modified optional requirement to provide tariff information in an ASCII format on a 3 1/2" floppy diskette.

Respectfully submitted,

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⁸ *Id.*, at 11.

⁹ *Id.*, at 58